Supreme Court, U.S.
FILED
MAY 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1935

In The

Supreme Court of the United States

October Term, 1989

FRANCIS J. WALSH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

DOES A COURT OF APPEALS HAVE JURISDICTION, PURSUANT TO 28 U.S.C. § 1291, TO HEAR AN INTERLOCUTORY APPEAL, IN A CRIMINAL CASE, OF A DISTRICT COURT'S DENIAL OF A MOTION TO DISMISS AN INDICTMENT ON GROUNDS OF PROSECUTORIAL MISCONDUCT BEFORE THE GRAND JURY AND GRAND JURY ABUSE UNDER THE COLLATERAL ORDER EXCEPTION OF *COHEN V. BENEFICIAL INDUSTRIAL LOAN CORP.*

LIST OF PARTIES

The parties before the Court of Appeals included the petitioner, respondent, and co-defendants and co-appellants Peter John Gould and Charles F. Quinn.

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REFERENCE TO ORDERS OF THE COURT OF APPEALS

On February 23, 1989, the United States Court of Appeals for the Ninth Circuit entered two orders granting the respondent's motions to dismiss two interlocutory appeals, *United States v. Francis J. Walsh*, Nos. 89-10014 and 89-10015 (9th Cir.), from the District Court's denial of two motions to dismiss the indictment on grounds of prosecutorial misconduct before the grand jury and grand jury abuse. True and correct copies of the two unpublished orders of the Ninth Circuit of February 23, 1989, are attached hereto and incorporated herein as Appendices A and B respectfully. On March 9, 1989, petitioner filed petitions for rehearing and suggestions for rehearing *en banc*. On March 29, 1989, the Ninth Circuit entered two orders denying the petitions for hearing and rejecting the suggestions for rehearing *en banc*. True and correct copies of the two unpublished orders of the Ninth Circuit of March 29, 1989, are attached hereto and incorporated herein as Appendices C and D, respectively.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254, which provides, in pertinent part:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

See also Rule 20.1 of this Court.

The two orders of the Ninth Circuit, granting the respondent's motions to dismiss the two appeals, were filed on February 23, 1989. The interlocutory appeals were filed in the Ninth Circuit from the District Court's denial of two separate motions to dismiss the indictment due to prosecutorial misconduct before the grand jury and grand jury abuse. Petitions for rehearing and suggestions for rehearing *en banc* were filed on March 9, 1989, in regard to each order dismissing the appeals. The petitions for rehearing were denied on March 29, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . , nor shall any person . . . be deprived of life, liberty, or property without due process of law. . . ."

Statutes

28 U.S.C. § 1291

The Courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

STATEMENT OF FACTS

Petitioner was indicted by the grand jury of the United States District Court for the Northern District of California on September 24, 1986, on mail fraud and conspiracy charges. *United States v. Francis J. Walsh et al*, No. CR-86-0831 RFP (N.D.Cal.). Thereafter petitioner filed two motions to dismiss the indictment on grounds of prosecutorial misconduct before the grand jury and grand jury abuse.

A. Motion to Dismiss – McNally

The first motion sought dismissal of the indictment for failure to allege a mail fraud in light of *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875 (1987) and that the presentation of the case to the grand jury on a now-rejected theory of mail fraud was prosecutorial misconduct and constituted grand jury abuse.[1] The District Court, the Honorable Robert F. Peckham, Senior United States District Judge, denied the motion to dismiss by a Memorandum and Order filed January 4, 1989.

On January 9, 1989, petitioner filed his notice of interlocutory appeal of the denial of this motion to dismiss the indictment based on Ninth Circuit case law requiring motions to dismiss on grounds of prosecutorial misconduct before the grand jury and grand jury abuse to be filed and heard as interlocutory appeals in light of this Court's decision in *United States v. Mechanik*, 475 U.S. 66,

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[1] The motion to dismiss also raised other *McNally* issues concerning the sufficiency of the indictment and other grounds for dismissing the indictment not pertinent herein.

106 S.Ct. 938 (1986) (holding violation of Rule 6(d) of the Federal Rules of Criminal Procedure, limiting the persons who may be present in a grand jury proceeding, rendered harmless by petit jury's verdict of guilty). *United States v. Tobias*, 836 F.2d 449 (9th Cir.), *cert. denied*, ___U.S.___, 108 S.Ct. 1299 (1988); *United States v. Dederich*, 825 F.2d 1317 (9th Cir. 1987); *United States v. Benjamin*, 812 F.2d 548 (9th Cir. 1987). On February 6, 1989, respondent filed a motion to dismiss the appeal, contending the appeal was not from a final decision of the District Court, pursuant to 28 U.S.C. § 1291, nor did it fall within the collateral order exception to the final decision rule established in *Cohen v. Beneficial Industrial Corp*, 337 U.S. 541 (1949). Petitioner opposed the motion, relying on clear Ninth Circuit case law requiring such an appeal to be filed and heard as an interlocutory appeal. *United States v. Howard*, 868 F.2d 548 (9th Cir. 1979) (interlocutory appeal required if challenge to grand jury's charging process instead of fundamental fairness of criminal proceeding); *United States v. Eccles*, 850 F.2d 1357 (9th Cir. 1988) (interlocutory appeal required if issue subject to harmless error); *United States v. Tobias, supra* (interlocutory appeal required of denial of motion for discovery of grand jury transcripts); *United States v. Dederich, supra* (interlocutory appeal required of denial of motion to dismiss on grounds of prosecutorial misconduct before the grand jury and grand jury abuse); *United States v. Benjamin, supra* (interlocutory appeal required of denial of motion to dismiss for violation of grand jury secrecy rules). The Ninth Circuit, by an order of February 23, 1989, granted the motion to dismiss without explanation. See Appendix A. On March 9, 1989, petitioner filed a petition for rehearing and suggestion

for rehearing *en banc*. The Ninth Circuit, by an order of March 29, 1989, denied the petition for rehearing and rejected the suggestion for rehearing *en banc* without explanation. See Appendix C. This petition seeks review of the Ninth Circuit's order dismissing the appeal.

B. Motion To Dismiss – Privileged Documents

The second motion to dismiss sought dismissal of the indictment in that documents obtained by the government in violation of the attorney-client privilege and attorney work product privilege were presented to the grand jury and thus the indictment was the product of prosecutorial misconduct before the grand jury and grand jury abuse. The District Court denied the motion to dismiss by an Order filed January 4, 1989.

On January 9, 1989, petitioner filed his notice of interlocutory appeal of the denial of this motion to dismiss the indictment based on the Ninth Circuit case law of *Howard, Eccles, Tobias, Dederich,* and *Benjamin, supra* (as discussed *supra*). On February 6, 1989, respondent filed a motion to dismiss the appeal, contending the appeal was not from a final decision of the District Court, pursuant to 28 U.S.C. § 1291, nor did it fall within the collateral order exception to the final decision rule under *Cohen, supra*. Petitioner opposed the motion, relying on the clear Ninth Circuit case law of *Howard, Eccles, Tobias, Dederich,* and *Benjamin, supra*. The Ninth Circuit, by an order of February 23, 1989, granted the motion to dismiss without explanation. See Appendix B. On March 9, 1989, petitioner filed a petition for rehearing and suggestion for rehearing *en banc*. The Ninth Circuit, by an Order of March 29, 1989, denied the petition for rehearing and

rejected the suggestion for rehearing *en banc* without explanation. See Appendix D. This petition seeks review of the Ninth Circuit's order dismissing the appeal.[2]

REASONS FOR GRANTING THE WRIT

In *United States v. Mechanik, supra,* this Court held that any error in the grand jury's charging decision that may have flowed from a violation of the limitation on persons permitted to be present in grand jury proceedings, pursuant to Rule 6(d) of the Federal Rules of Criminal Procedure, was rendered harmless by the petit jury's verdict of guilty. Since *Mechanik* the lower federal courts have struggled with the issue of the meaning and scope of *Mechanik* in regard to the interlocutory appealability to the courts of appeals of denials by district courts of motions to dismiss indictments on grounds of prosecutorial misconduct before the grand jury or grand jury abuse.

In *Midland Asphalt Corp. v. United States,* ___U.S.___, 109 S.Ct. 1494 (March 28, 1989) this Court held that a district court's denial of a motion to dismiss for violation of the grand jury secrecy provisions of Rule 6(e) of the Federal Rules of Criminal Procedure is not subject to interlocutory appeal. However, in the process of deciding *Midland Asphalt* this Court expressly did not resolve the scope of *Mechanik*:

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[2] Under Rule 19.4 of this Court a single petition may raise both of these closely related motions to dismiss and the dismissal of the appeals.

> "Thus, whatever view one takes of the scope of *Mechanik* (an issue we need not resolve here), the present order is not immediately appealable."

Midland Asphalt, supra, ___U.S.___, 109 S.Ct. at 1498. Furthermore, this Court noted that the courts of appeal are split on the issue of the immediate appealability of denials of motions to dismiss indictments for prosecutorial misconduct before the grand jury or grand jury abuse. *Midland Asphalt, supra,* ___U.S.___, 109 S.Ct. at 1497 n.1 (surveying the circuits); see also, *United States v. Helmsley,* 866 F.2d 19 (2nd Cir. 1988) (Rule 6(e) grand jury secrecy issues not immediately appealable).

This Court should grant the instant petition for a writ of certiorari to review the interlocutory appealability of the two orders of the Ninth Circuit dismissing petitioner's appeals. It is an issue expressly left open by this Court in *Midland Asphalt*. This case has badly split the courts of appeal that have dealt with the issue and is of critical importance to the federal criminal justice system. Counsel for criminal defendants must now, because of the uncertainty of how this Court ultimately will interpret the scope of *Mechanik,* and how the courts of appeal will interpret it, file an interlocutory appeal from the denial by a district court of a motion to dismiss an indictment on grounds of prosecutorial misconduct before the grand jury or grand jury abuse to determine the appealability of the order or run the risk of being accused of being incompetent counsel by not appealing until after conviction and finding out the issue is not then appealable because of *Mechanik*. This is an issue of great importance to defendants, to the government, to counsel, to the judiciary, and to the public that should be resolved by this Court now.

It is clear that a pre-conviction challenge to an indictment may be made on the ground that errors in the grand

jury proceedings leading up to an indictment affected the grand jury's decision to indict. *Bank of Nova Scotia v. United States*, ___U.S.___, 108 S.Ct. 2369 (1988). What is unclear to all the courts of appeal is how *Midland Asphalt*, *Bank of Nova Scotia*, and *Mechanik* impact on the interlocutory appealability of the denial of such a motion to dismiss an indictment. It is an issue this Court left unresolved in *Midland Asphalt, supra.*

CONCLUSION

The instant petition presents the issue of the interlocutory appealability of the denial of a motion to dismiss an indictment on grounds of prosecutorial misconduct before the grand jury and grand jury abuse unclouded by other issues, including the merits of petitioner's contentions, which have yet to be resolved by the Ninth Circuit. It is an issue that has expressly been left open by this Court in *Midland Asphalt, supra,* has split the courts of appeal, and is of critical importance to the operation of the federal criminal process. This Court should grant the petition and set the case for full briefing and argument.

DATED: May 26, 1989

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. FRANCIS J. WALSH, Defendant-Appellant.	No. 89-10014 DC# CR 86-831-RFP Northern California ORDER (Filed Feb. 23, 1989)

Before: GOODWIN, NELSON and BRUNETTI, Circuit Judges

Appellee's motion to dismiss is granted. This appeal is dismissed.

Appellee's motion to consolidate is moot. Appellant's motion to refer this appeal to the previous merits panel is moot.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. FRANCIS J. WALSH, Defendant-Appellant.	No. 89-10015 DC# CR 86-831-RFP Northern California ORDER (Filed Feb. 23, 1989)

Before: GOODWIN, NELSON and BRUNETTI, Circuit Judges

Appellee's motion to dismiss is granted. This appeal is dismissed.

Appellee's motion to consolidate is moot. Appellant's motion to refer this appeal to the previous merits panel is moot.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. FRANCIS J. WALSH, Defendant-Appellant.	No. 89-10014 DC# CR 86-831-RFP Northern California
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. PETER JOHN GOULD, Defendant-Appellant.	No. 89-10020 DC# CR 86-831-RFP Northern California
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. CHARLES F. QUINN, Defendant-Appellant.	No. 89-10026 DC# CR 86-831-RFP Northern California ORDER (Filed March 29, 1989)

Before: GOODWIN, NELSON and BRUNETTI, Circuit Judges

Appellants' petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. FRANCIS J. WALSH, Defendant-Appellant.	No. 89-10015 DC# CR 86-831-RFP Northern California
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. PETER JOHN GOULD, Defendant-Appellant.	No. 89-10021 DC# CR 86-831-RFP Northern California
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. CHARLES F. QUINN, Defendant-Appellant.	No. 89-10029 DC# CR 86-831-RFP Northern California ORDER (Filed March 29, 1989)

Before: GOODWIN, NELSON and BRUNETTI, Circuit Judges

Appellants' petition for rehearing is denied and the suggestion for rehearing en banc is rejected.